



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-93-22

### FACTS:

A Governor's Advisory Council (Council) was organized to provide the Governor with input and advice on issues related to the Massachusetts economy. Members of the business and academic communities, as well as individuals within the Administration, had reason to believe that the Governor would be receptive to private sector viewpoints on certain economic issues. The Council, however, was never officially formed by the Governor, nor were its members officially appointed.

The Council has submitted various reports to the Governor, all advisory in nature, and has primarily focused on analyzing various industries and making policy recommendations to the Governor. One recommendation resulted in the creation of a particular program within a state agency. That program is funded in part by the private sector. The Council's recommendations contributed to the Administration's decision to support two initiatives which were incorporated into legislation filed by the Governor, which was subsequently enacted by the Legislature. The Council's recommendations, however, do not amount to policies and programs which may be readily adopted and implemented by executive branch agencies.

The Administration views the Council as representative of one particular constituent group in the Commonwealth. The Governor now wishes to publicly acknowledge the importance of the issues on which the Council has been focusing and would like to motivate or encourage the Council to continue the work it has been doing. Accordingly, the Governor has decided to formally create the Council through Executive Order as he has done with other advisory groups representing various constituent groups [1]. The Governor's decision to create the Council through an Executive Order is completely discretionary.

In the future, the Council will continue to be made up of members from the private sector and academia. They will be chosen for their expertise in various areas relevant to the work of the Council. As in the past, Council members will not receive any compensation nor will they be reimbursed for expenses. The Council will not receive, nor will it expend or control, public funds. There is no required number of members, nor is there any required number of meetings of the Council. Sub-committees may be designated at the direction of the Council chair. All reports of the Council will be advisory in nature, and the Governor will not be required to adopt or implement them, in whole or in part. Council members will have no authority delegated to them. The Council's purpose will be to continue to serve as an outside resource to the Governor and to provide him with the benefit of members' expertise. No government officials are members of the Council, but the Governor attends the Council meetings, usually with the Lieutenant Governor and the Secretary of Economic Affairs. Although these government officials meet regularly with the Council, the work of the Council is performed by its members.

### QUESTION:

Will Council members be considered state employees for purposes of the conflict of interest law?

### ANSWER:

No.

## DISCUSSION:

For purposes of the conflict of interest law, a state employee is defined as “a person performing services for or holding an office, position, employment, or membership in a state agency [2], whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council.” G.L. c. 268A, s. 1(q).

The Commission has previously considered four factors in determining whether an advisory committee will be considered a state agency or instrumentality thereof. No single factor is dispositive of this determination. Those factors are:

- 1) the impetus for the creation of the committee (whether required by statute, rule, regulation or otherwise);
- 2) the degree of formality associated with the committee and its procedures;
- 3) whether members of the committee will perform functions or tasks expected of government employees, or will they be expected to represent outside viewpoints;
- 4) the formality of the committee’s work product, if any. EC-COI-86-4; 86-5.

We must examine the Council in light of these four factors. First, the Council was not created pursuant to statute, rule, or regulation, but rather by the Governor in his discretion. See EC- COI-83-21 (task force set up by Governor on his own initiative as opposed to statutory requirement was not a public entity); contrast EC-COI-82-157 (advisory council established by G.L. c. 7, s. 40M on a permanent basis rather than a temporary or ad hoc basis resulted in finding of state employee status for members). In prior opinions, we have considered the fact that a committee is a permanent and mandatory component to the implementation of a state statute to be an important factor in finding state agency status. See EC-COI-87-17 (Water Resources Management Advisory Committee of the Department of Environmental Quality Management established as a mandatory committee under St. 1985, c. 592); 86- 4 (Administrative Penalties Advisory Committee mandatory and permanent committee pursuant to state statute). Here, the members of the Council will serve at the pleasure of the Governor and the Council is not required to remain in existence for any definitive period.

Second, the Council is not organized or required to function pursuant to formal guidelines set out by Governor. For example, the number of members, the term of office, the number of meetings, etc., are not specified in the draft Executive Order. Similarly, there are no specified procedures for the conduct of Council meetings or the participation by Council members in those meetings. See e.g., EC-COI-82-81 (notwithstanding procedural guidelines outlining the scope of work, goals, timetables and anticipated work product, task force member are not public employees where formality of procedures is merely an effort to have task force function in a timely and organized manner).

Third, the Commission has previously placed considerable emphasis on whether the committee performs tasks ordinarily expected of public employees or whether the committee serves to represent outside viewpoints. In EC-COI-87-17 we contrasted a committee engaged in regulation formation, an essentially governmental function, with a committee which principally served as a sounding board for constituent groups. The latter committee would not be engaging in tasks ordinarily expected of public employees. See EC-COI-86-5 (advisory committee set up to ensure that agency receives the informed opinions of a broad spectrum of the local population concerning the impact of an agency program would not be public instrumentality); contrast 86-4 (finding state agency status where permanent committee’s principal function is to assist in the drafting of regulations, a task ordinarily engaged in by public employees). In summary, we have traditionally focused on whether the board is serving in a clearly advisory capacity with regard to a particular project or program as opposed to engaging in traditional governmental functions such as the formulation of regulations or the evaluation of agency budgets.

Here, we find that members of the Council principally serve to provide the Governor with outside viewpoints. It appears that, through the Council, the Governor will have access to opinions and expertise which is not otherwise available within the executive branch. The Council and its subcommittees serve to identify needs and ideas for programs, but do not provide detailed policies and programs that may be readily adopted by

executive branch agencies. In other words, the Council does not perform the work of executive branch agencies nor has the Governor delegated any of his statutory authority to the Council. See Opinion of the Justices, 368 Mass. 866 (1975) (members of Judicial Nominating Committee established by executive order did not hold public office where function of committee was to advise and make non-binding recommendations to the Governor; the Governor had not delegated his constitutional duty of judicial appointment to the Committee). We note that, in one instance, a subcommittee submitted draft legislation as part of its report. We do not, however, find that the drafting of legislation constitutes performing a function ordinarily or uniquely expected of government employees [3]. This is especially the case where the Governor has the option of filing his own legislation. See EC-COI-82-81 (task force engaged in drafting legislation not a public instrumentality where public official has option of filing his own recommended legislation). We caution, however, that were the Council to engage in other activities, such as the drafting of regulations or lobbying the Legislature on behalf of an executive agency, our conclusion as to the Council's principal function, and therefore as to its status as a public instrumentality, could change [4]. See EC-COI-86-4.

Finally, pursuant to the draft Executive Order, the Council's work product may vary from recommendations to more detailed and significant analyses. There does not appear, however, to be any requirement that the work product take any specific form. Moreover, you inform us that the Council's recommendations are considered advisory in nature and the Governor will not be required to adopt or implement them in whole or in part. See EC-COI-83-21 (task force that created report which contained only recommendations and which had no binding authority over any state agency or employees was not a governmental entity).

Applying all of the foregoing factors which we have traditionally considered in determining whether an entity is an instrumentality of a governmental agency, we conclude that the Council is not an instrumentality of the Governor's Office. Council members will not therefore be considered state employees for purposes of the conflict of interest law.

**DATE: December 7, 1993**

<sup>1</sup>In a like fashion, the Governor recently recognized the work of the Hispanic American Advisory Commission by Executive Order.

<sup>2</sup>A state agency is defined as . . . any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town. G.L. c. 268A, s. 1(p).

<sup>3</sup>We do not recognize the drafting of legislation as an exclusive task of government employees where citizens of the Commonwealth may draft and seek to have introduced their proposed legislation. In contrast, the drafting of regulations is a governmental function customarily initiated by government agency staff as recognized by the Administrative Procedures Act, G.L. c. 30A, ss. 2 et. seq. See EC-COI-86-4.

<sup>4</sup>Similarly, if the Governor delegated particular functions of his office to the Council, or if the Council's recommendations were binding, our conclusion here concerning the status of Council members could change.